

CREATING A MORE DANGEROUS BRANCH: HOW THE UNITED KINGDOM'S HUMAN RIGHTS ACT HAS EMPOWERED THE JUDICIARY AND CHANGED THE WAY THE BRITISH GOVERNMENT CREATES LAW

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ABSTRACT

Power struggles between government branches are nothing new. What is new is how those struggles have recently changed in the United Kingdom as a result of the constitutional reforms enacted by Tony Blair and the Labour Party. In addition to incorporating fundamental human rights into the British legal system, the enactment of the Human Rights Act 1998 resulted in the alteration of the balance of power between the three British government branches, with the judiciary and legislature achieving substantial gains in influence and independence. An unintentional side-effect of these changes is that the British government structure now appears to have a more American style with a stronger separation of powers. More specifically, the British legislature and judiciary have gained new powers when human rights laws are implicated, which place these branches on more equal footing with the traditionally dominant executive branch. As this article shows, when creating or altering laws that involve human rights, government branch interactions are noticeably different, and the legislature and judiciary now have more of an impact on which laws will stand the test of time.

INTRODUCTION	302
I. THE INTERACTIONS OF THE UNITED KINGDOM'S THREE GOVERNMENT BRANCHES.....	303
A. Constitutional Impact of the Human Rights Act.....	306
B. British Government Branch Strategies	308
1. Executive	308
2. Legislature	310
a. The Joint Committee on Human Rights.....	312

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b. Human Rights Act Section 19 Statement of Compatibility	315
3. The Judiciary	318
a. Power to Interpret	321
b. Declaration of Incompatibility	323
c. The Impact of the European Court of Human Rights	325
d. Deference to Parliament	327
II. CHARTS	329
A. Chart 1—Judge’s Attitudes	330
B. Chart 2—Adding the Legislature/executive’s Preferences	330
C. Chart 3—Judiciary’s Awareness of Potential Override	331
D. Chart 4—Judiciary’s Strategies	332
CONCLUSION	334

INTRODUCTION

Legal and political science scholars have long recognized that political actors, including government branches, have policy goals and will try to advance those goals when creating law.¹ To do so, these actors engage in strategic actions or gamesmanship, which can be seen in the interactions between the government branches in the creation of constitutional and other types of law.² Scholars have studied these interactions for decades and have resulted in the invention of a variety of constitutional theories about how government branches work together (or against each other) to create law.³ To put it simply, according to these scholars, each government branch has a preference for what a certain law will say and each branch will act strategically to ensure that the enacted law closely matches its preference.⁴

1. See, e.g., James R. Rogers, *Information and Judicial Review: A Signaling Game of Legislative Judicial Interaction*, 45 AM. J. POL. SCI. 84, 84 (2001); see also Daniel E. Ingberman & Dennis A. Yao, *Presidential Commitment and the Veto*, 35 AM. J. POL. SCI. 357, 357 (1991); see also Pablo T. Spiller & Rafael Gely, *Strategic Judicial Decisionmaking* (Nat’l Bureau of Econ. Research, Working Paper No. 13321, 2007).

2. Some of the more dramatic versions of these strategies, which can lead to fundamental constitutional changes, have been called “constitutional hardball” by Mark Tushnet and “constitutional showdowns” by Eric Posner and Adrian Vermeule. Mark V. Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 528-29 (2004); Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 997 (2008).

3. These theories are commonly called rational choice, public choice, or positive political theories. Morris P. Fiorina, *Rational Choice, Empiric Contributions, and the Scientific Enterprise*, in *THE RATIONAL CHOICE CONTROVERSY* 87, 97 (Jeffrey Friedman ed., 1996). Theorists appear to use these theory titles interchangeably. See, e.g., William Riker, *Political Science and Rational Choice*, in *PERSPECTIVES ON POSITIVE POLITICAL ECONOMY* 173 (James E. Alt & Kenneth A. Shepsle eds., 1990).

4. See McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J. L. ECON. & ORG., Mar. 180, 181 (1999); see also John Ferejohn & Barry Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT’L REV. L. & ECON. 263, 269-70 (1992).

The strategies include anticipating the other branches' policy preferences and drafting legislation that is close enough to their preferences to provide disincentive for the other branches to bother overriding the law.⁵

For government branches to be able to behave strategically with each other, they arguably must be separate and equal in their powers.⁶ The United States therefore presents a useful starting point from which to study these kinds of strategic government interactions. In contrast, the British parliamentary system has historically deemphasized the doctrine of separation of powers and has been dominated by the executive branch.⁷ However, recent constitutional changes have brought the British government structure closer to that of the United States, with stronger separation of powers and increased power for both the legislature and the judiciary, particularly in the area of human rights law. More specifically, the Human Rights Act 1998 has given Parliament greater oversight over bills introduced by the executive, and it has given the judiciary the ability to creatively interpret statutes and issue non-binding Declarations of Incompatibility when a statute is in conflict with human rights law. These new powers put all of the government branches on more equal footing. Therefore, the British government actors can now strategize with each other when creating human rights laws just as their American counterparts do.

In Part I, this article examines how the British government branches have historically interacted and how those interactions have changed with the enactment of the Human Rights Act. This article then analyzes the potential political strategies each branch can use when creating law, with an emphasis on the difference between the American and British government structures and strategies. In Part II, Charts will be used to show how the different British government branches strategize when interacting with each other and how those strategies will differ when human rights legislation is involved.

I. THE INTERACTIONS OF THE UNITED KINGDOM'S THREE GOVERNMENT BRANCHES

The United Kingdom's constitutional history is in stark contrast to the circumstances surrounding the creation of the United States Constitution. There is no codified British constitution that was drafted in response to the

5. Andrew D. Martin, Congressional Decision Making and the Separation of Powers, 95 AM. POL. SCI. R. 361, 376 (2001).

6. See, e.g., Tonja Jacobi, The Impact of Positive Political Theory on Old Questions of Constitutional Law and the Separation of Powers, 100 NW. U. L. REV. 259, 260-61 (2006). Indeed, these studies of the interactions of American government branches are often called "Separation of Powers (SOP) studies." Luke M. Milligan, Congressional End-Run: The Ignored Constraint on Judicial Review, 45 GA. L. REV. 211, 229 (2010).

7. R. M. PUNNETT, BRITISH GOVERNMENT AND POLITICS 175 (5th ed. 1987).

revolutionary creation of a new nation.⁸ Instead, the United Kingdom's constitution and government structure have developed in a gradual and piecemeal fashion that is altered whenever the United Kingdom decides it needs to change.⁹ Because there was no deliberate attempt to create a British government, the three branches were also left to develop on their own, and there was no explicit attempt to separate their functions.¹⁰ The United Kingdom's three branches of government are, therefore, more integrated, with members of one branch often participating in another.¹¹ For example, in order to be part of the executive branch—the Prime Minister and his or her cabinet¹²—a person must also be part of the legislative branch by being either a member of the House of Commons or the House of Lords.¹³ Indeed, only the party with the majority of members in the House of Commons is permitted to form the executive branch.¹⁴

Comparative studies that have analyzed the United Kingdom or another parliamentary style government have given little attention to its different government structure when predicting government strategic action.¹⁵ More in-depth studies of the British government or those studies done by British scholars have focused on particular sections of British politics such as political party dominance,¹⁶ local government competition,¹⁷ and the effects of government regulation and interest groups on land use planning.¹⁸ Scholars have also examined some aspects of the United Kingdom's government structure and processes, such as cabinet reshuffles,¹⁹ multi-

8. PETER LEYLAND, *THE CONSTITUTION OF THE UNITED KINGDOM: A CONTEXTUAL ANALYSIS* 9 (2007).

9. *Id.* at 16.

10. *Id.* at 54-55.

11. *Id.* at 55.

12. MALCOLM WALLS, *BRITISH AND AMERICAN SYSTEMS OF GOVERNMENT* 78 (1988). The British Monarch is also part of the executive but his or her role is primarily ceremonial. Although the Monarch does retain many prerogative powers, modern conventions have all removed his or her ability to actually affect the actions of the government. *Id.* Consequently, this article will not be discussing the impact of the Monarch.

13. LEYLAND, *supra* note 8, at 86.

14. DAWN OLIVER, *CONSTITUTIONAL REFORM IN THE UK* 8 (2003).

15. For example, in a discussion on the different models of executive and legislative relationships, parliamentary models were given only the briefest discussion, whereas the United States model and those of South American presidentialismo systems were analyzed in much greater depth. See Barry Weingast, *Rational-Choice Institutionalism*, in *POLITICAL SCIENCE: STATE OF THE DISCIPLINE* 660, 666 (Ira Katznelson & Helen V. Milner eds., 2002).

16. See Robert D. Cooter & Tom Ginsburg, *Comparative Judicial Discretion: An Empirical Test of Economic Models*, 16 *INT'L REV. L. & ECON.* 295, 297 (1996).

17. See generally George A. Boyne, *PUBLIC CHOICE THEORY AND LOCAL GOVERNMENT: A COMPARATIVE ANALYSIS OF THE UK AND THE USA* (1998).

18. See generally Mark Pennington, *PLANNING AND THE POLITICAL MARKET: PUBLIC CHOICE AND THE POLITICS OF GOVERNMENT FAILURE* (2000).

19. See Indridi H. Indridason & Christopher Kam, *Cabinet Reshuffles and Ministerial Drift*, 38 *BRIT. J. POL. SCI.* 621, 622 (2008).

party systems,²⁰ and voting,²¹ but have not fully explained how the British government branches interact to create laws.

Moreover, unlike the United States, there is no system in the United Kingdom that ensures that all three branches have enough power to oppose the other branches.²² Although the United Kingdom does differentiate between the three branches of government, the United Kingdom does not have a fully developed system of checks and balances. In theory, the Prime Minister and his or her cabinet (the executive) can impose their will upon Parliament (the legislature) through a strong party system.²³ In turn, Parliament can impose its will upon the judiciary through the doctrine of parliamentary sovereignty.²⁴

In contrast to what occurs in Congress, Members of the House of Commons virtually always vote along party lines.²⁵ If they vote against their party, they can expect to not receive party support in the next election and may well lose their seat in Parliament.²⁶ Because the executive is from the political party with a majority of seats in the House of Commons, a strong and popular executive branch can normally push through almost any legislation it likes. The executive branch's fellow political party members, whom, by definition, have the majority in the Commons, will usually ensure that the executive's legislation is passed.²⁷

Once legislation is passed, the executive can also rely upon the judiciary to defer to Parliament when interpreting the legislation.²⁸ Although it is the executive that actually proposes and compels the passage of most legislation, the judiciary uses the doctrine of parliamentary sovereignty to

20. See Gilat Levy, A Model of Political Parties, 115 J. ECON. THEORY 250, 257 (2004); see also Daniel Diermeier & Timothy J. Federsen, Cohesion in Legislatures and the Vote of Confidence Procedure, 92 AM. POL. SCI. REV. 611 (1998).

21. See generally DAVID ROBERTSON, CLASS AND THE BRITISH ELECTORATE (1984); see e.g., David Austen-Smith & Jeffrey Banks, Elections, Coalitions, and Legislative Outcomes, 82 AM. POL. SCI. REV. 405, 405-22 (1988); see e.g., Valentino Larcinese, Electoral Competition and Redistribution with Rationally Informed Voters, 4 CONTRIBUTIONS TO ECON. ANALYSIS & POL. 1, 1-28 (2005).

22. J.A.G. GRIFFITH, THE POLITICS OF THE JUDICIARY xvii (5th ed. 1997).

23. See DUNCAN WATTS, UNDERSTANDING US/UK GOVERNMENT AND POLITICS: A COMPARATIVE GUIDE 40, 120 (2d ed. 2008).

24. *Id.*; LEYLAND, *supra* note 8, at 36.

25. LEYLAND, *supra* note 8, at 87. The power of party affiliation may be lessening with the increased use of social media. Michael White, *G2: Our Politicians are Revolting!: Believe it or not, this Parliament is the Most Rebellious yet. Michael White Explains why Twitter, Rolling News and Coalition angst mean the Modern Backbencher is far more Likely to Defy the Whip*, GUARDIAN, May 29, 2012, at 6.

26. LEYLAND, *supra* note 8, at 87.

27. OLIVER, CONSTITUTIONAL REFORM IN THE UK, *supra* note 14, at 8. There are exceptions to this scenario, such as when there is a Coalition Government where two or more parties share the majority of members of the House of Commons. Unpopular Prime Ministers may also face opposition from their own party members, particularly for controversial legislation.

28. *Id.* at 29.

effect the will of Parliament.²⁹ The judiciary will therefore invariably limit itself to the text of the legislation when determining how it should apply to a certain case. Accordingly, the executive can dominate both the legislative and judicial branches of the British government. However, recent constitutional changes have given the British government a stronger separation of powers with more co-equal government branches.³⁰ Since the passage of the Human Rights Act, the executive branch's reach has become limited when its legislation affects human rights.

A. Constitutional Impact of the Human Rights Act

After the Labour Party came to power in the United Kingdom in 1997, it began to implement the vast constitutional changes it promised in its election manifesto.³¹ By relying on its popular support, the Labour Party was able to quickly implement a variety of constitutional changes, such as devolution of government powers to Wales and Scotland, and increased human rights protections.³² More specifically, the enactment of the Human Rights Act has dramatically affected the United Kingdom's human rights laws and constitutional structure.

The Human Rights Act's primary purpose is to incorporate the rights contained in the European Convention on Human Rights into British law so that those rights are now enforceable in British courts.³³ The Human Rights Act has altered the entire concept of "rights" within the United Kingdom by changing it from a negative system with "presumptions of liberty" to one where rights are actively enforced by all three branches of government.³⁴ Changing how rights are viewed has not been an easy transition for the United Kingdom. Prior to the Human Rights Act, the European Convention on Human Rights was unpopular in the United Kingdom because it was

29. Douglas W. Vick, *The Human Rights Act and the British Constitution*, 37 TEX. INT'L L.J. 329, 338 (2002); LEYLAND, *supra* note 8, at 38-39.

30. As shown below, one of the main pieces of legislation that introduced these changes is the Human Rights Act 1998.

31. Lord Lester, *The Art of the Possible—Interpreting Statutes Under the Human Rights Act*, EUR. H.R. L. REV. 665, 668 (1998); FRANCESCA KLUG, VALUES FOR A GODLESS AGE: THE STORY OF THE UK'S NEW BILL OF RIGHTS 62 (2000); *Britain Will Be Better with New Labour*, ARCHIVE OF LABOUR PARTY MANIFESTOS, <http://www.politicsresources.net/area/uk/man/lab97.htm> (last visited June 19, 2012).

32. Dominic McGoldrick, *The United Kingdom's Human Rights Act 1998 in Theory and Practice*, 50 INT'L & COMP. L.Q. 901, 901-02, 905 (2001).

33. LEYLAND, *supra* note 8, at 170.

34. FRANCESCA KLUG, *The United Kingdom Experience*, in COMPARATIVE PERSPECTIVES ON BILLS OF RIGHTS 1 (Christine Debono & Tania Colwell eds., 2004). Some of the rights contained in the European Convention on Human Rights are the freedom to be free from torture, the right to a fair trial, and freedom of religion. Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 3, 6, 9, Sept. 21, 1970, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

seen “as being ‘European’ and not connected to the UK.”³⁵ Suspicion of the European Convention on Human Rights and the Human Rights Act has remained since its enactment over ten years ago.³⁶ The Human Rights Act is also controversial because it upsets existing norms of judicial deference to parliament.³⁷

Perhaps the Human Rights Act’s most powerful component is its requirement that the three branches of government interact to ensure that British legislation adequately protects human rights.³⁸ Each branch of the government plays a role in creating law under the Human Rights Act and, consequently, political (if not actual) power must be shared by all three government branches.³⁹ Parliament gained a powerful new committee to oversee the human rights implications of new and existing laws: the Joint Committee on Human Rights.⁴⁰ The judiciary gained two new powers: the

35. JoAnne Sweeny, *The United Kingdom’s Human Rights Act: Using Its Past to Predict Its Future*, 12 LOY. J. PUB. INT. L. 39, 41 (2010).

36. Both the press, particularly the tabloids, and leaders in the Conservative Party have attacked the Human Rights Act. See, e.g., Macer Hall, *Human Rights Act? Scrap it; Cameron’s Call to Ditch ‘Villains’ Charter*, THE EXPRESS, Dec. 9, 2008; Steve Doughty, *Has this Judge Become a Law Unto Himself?*, DAILY MAIL, Feb. 20, 2003, at 5. Even the Commission set to provide proposals for a British Bill of Rights has reached an impasse. Christopher Hope, *Leaked Emails Point to “Fatal Divide” in Panel Drawing up Plans for Promised Bill of Rights; Leaks Reveal “Fatal Flaws” of Rights Panel*, DAILY TEL., Mar. 13, 2012, at 1.

37. Fears of judicial activism dominated the parliamentary debates surrounding the Human Rights Act’s passage into law. See Sweeny, *supra* note 35, at 63 (citing 582 PARL. DEB., H.L. (5th ser.) (1997) 1254 (Lord Waddington), 1238 (Lord Kingsland), 1266-68 (Lord McClusky), 1267 (Lord McClusky), 1275 (Lord Borrie), 1262-63 (Lord Mayhew), 1281 (Lord Wilberforce), 66 (Lord Donaldson), 1306 (Lord Henley), 1254 (Lord Waddington)).

38. This branch interaction was stressed when the Human Rights Act was being debated in Parliament. See, e.g., 314 PARL. DEB., H.C., (6th ser.) (1998), 1141 (U.K.), available at http://www.publications.parliament.uk/pa/cm199798/cmhansrd/vo980624/debtext/80624-47.htm#80624-47_spnew3. However, some members of the senior judiciary notably stated that it was not their place to engage in this dialogue. See, e.g., JOINT COMMITTEE ON HUMAN RIGHTS, MINUTES OF EVIDENCE: IMPLEMENTATION OF THE HUMAN RIGHTS ACT 1998 BEFORE THE J. COMM. ON HUMAN RIGHTS, MINUTES, H.L. 66-iii, H.C. 332-iii (2001) (U.K.), available at <http://www.publications.parliament.uk/pa/jt200001/jtselect/jtrights/jtrights.htm> (evidence presented by Right Honourable Lord Woolf of Barnes, Right Honourable Lord Phillips of Worth Matrayers, and Right Honourable Lord Bingham of Cornhill).

39. K. D. Ewing, *The Human Rights Act and Parliamentary Democracy*, 62 MODERN L. REV. 79, 79 (1999); Francesca Klug, *Judicial Deference under the Human Rights Act 1998*, 2 EUR. HUM. RTS. L. REV. 125, 132 (2003).

40. Human Rights Act, 1998, c. 42, § 19 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1998/42/data.pdf>; 621 PARL. DEB., H.L. (6th ser.) (2003) 11 (U.K.), available at http://www.publications.parliament.uk/pa/ld200001/ldhansrd/vo010122/text/10122-03.htm#column_11; During the debate in the Commons on the Joint Committee on Human Rights’ terms of reference, the then Deputy Leader of the House, Paddy Tipping MP, remarked that they were wide enough to allow the Committee to do “virtually what it wants.” 361 PARL. DEB., H.C. (6th ser.) (2001) 150 (U.K.), available at hansard.millbanksystems.

power to creatively interpret legislation to conform to the Human Rights Act and the power to declare legislation incompatible with European Convention on Human Rights.⁴¹

Although scholars have lavished attention on the human rights impact the Human Rights Act has had in the United Kingdom,⁴² there has been very little scholarship devoted to the vast constitutional changes the Human Rights Act has wrought. For example, the British government structure now more closely resembles the government of the United States, with increased judicial independence and more evenly distributed power among the three branches of government.⁴³ When the Human Rights Act shifted power away from the dominant executive to the legislature and the judiciary, it also created something of an American style of government with checks and balances between three (more) co-equal government branches. Each of these branches—executive, legislative and judicial—now has new strategies available to them when creating law.

B. British Government Branch Strategies

1. Executive

Strategic action for the executive branch entails obtaining political office and exerting influence so that the executive's preferences are taken into

com/commons/2001/jan/15/human-rights-joint-committee.

41. Human Rights Act, 1998, c. 42, §§ 3, 4 (Eng.). The European Convention on Human Rights is an international treaty that protects human rights in its European member states. The European Convention on Human Rights “sets forth a number of fundamental rights and freedoms,” such as “the right to life” and prohibition of torture. The European countries that have signed the European Convention on Human Rights must secure these rights and freedoms to everyone within their jurisdiction. In order to ensure that they do, the European Convention on Human Rights also established the European Court of Human Rights, which can hear “individual and inter-State petitions.” *Summary of the Convention for the Protection of Human Rights and Fundamental Freedom*, COUNSEL OF EUROPE, <http://conventions.coe.int/Treaty/en/Summaries/Html/005.htm> (last visited Oct., 2012).

42. See, e.g., Eric Barendt, *Freedom of Expression in the United Kingdom Under the Human Rights Act 1998*, 84 IND. L.J. 851 (2009); see also IAN LEIGH & ROGER MASTERMAN, MAKING RIGHTS REAL: THE HUMAN RIGHTS ACT IN ITS FIRST DECADE (2008); see also Christine Sypnowich, *Taking Britain's Human Rights Act Seriously*, 58 U. TORONTO L.J. 105 (2008).

43. The Constitutional Reform Act 2005, which separated the judiciary from the legislature and abolished the position of Lord Chancellor, also helped in creating a more American-style government. See Judith L. Maute, *English Reforms to Judicial Selection: Comparative Lessons for American States?* 34 FORDHAM URB. L.J. 387, 387-88 (2007); Peter L. Fitzgerald, *Constitutional Crisis over the Proposed Supreme Court for the United Kingdom*, 18 TEMP. INT'L & COMP. L.J. 233, 257-58 (2004). Both the Constitutional Reform Act and the Human Rights Act were part of the Labour Party's promise for “radical constitutional reform” in the 1997 general election. Sweeny, *supra* note 35, at 65-66.

account when laws are created.⁴⁴ The executive branch must therefore strategize with the other two branches in order to ensure that legislation is passed and interpreted with the executive's preferences in mind.⁴⁵ Executive actions are also subject to legislative override or judicial review, which may cause the executive to take those branches' preferences into account when enacting executive actions.⁴⁶ However, in the United States, the President does have a unique and powerful weapon at his disposal: the power to veto legislation, which requires that Congress muster a two-thirds majority before that bill can become a law.⁴⁷

As noted above, a major difference between the British and American government systems is the American government's separation of powers versus the United Kingdom's integration of powers. The British legislature and the executive are "inextricably intertwined and interdependent" because every member of the executive is also a member of the legislature.⁴⁸ The leader of the political party that has the majority of seats in the House of Commons, automatically becomes the Prime Minister.⁴⁹ That person is also required to be a member of Parliament—either in the House of Commons or the House of Lords.⁵⁰ The power of the executive over the legislature is also much stronger in the United Kingdom's parliamentary system.⁵¹ The Prime Minister lacks a veto power,⁵² which means that Parliament does not need to take the executive's views into account when drafting legislation. However, because the executive proposes almost all legislation considered by Parliament in the first place,⁵³ the executive's influence is very strong and, arguably, stronger than the President's veto power.⁵⁴

44. See generally Peter Ordeshook, *The Emerging Discipline of Political Economy*, in PERSPECTIVES ON POSITIVE POLITICAL ECONOMY (James E. Alt & Kenneth A. Shepsle eds., 1990); see also McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 9 (1994).

45. Jorgen Rasmussen, Executive and Legislative Roles, in POLITICS IN BRITAIN AND THE UNITED STATES 1, 19 (Richard Hodder-Williams & James Ceasar eds., 1986); McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, *supra* note 44, at 21.

46. *Id.*; Ernest A. Young, *Taming the Most Dangerous Branch: The Scope and Accountability of Executive Power in the United States*, in THE EXECUTIVE AND PUBLIC LAW 174 (Paul Craig & Adam Tomkins eds., 2006).

47. Ingberman & Yao, *supra* note 1, at 357.

48. WALLES, *supra* note 12, at 78.

49. LEYLAND, *supra* note 8, at 86. If no political party has a majority in the House of Commons, a coalition can be created. JOHN OAKLAND, *BRITISH CIVILIZATION: AN INTRODUCTION* 109 (7th ed. 2011).

50. WALLES, *supra* note 12, at 77.

51. Rasmussen, *supra* note 45, at 2.

52. PUNNETT, *supra* note 7, at 246-47.

53. A. W. BRADLEY & K. D. EWING, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 185 (13th ed. 2003).

54. OAKLAND, *supra* note 49, at 109.

The executives' difference in power extends to their dealings with the judiciary. Although the President appoints federal judges and, in that respect, has power over the judiciary, the judiciary also has power over the President because it may strike down any executive action or executive-proposed statute that it considers unconstitutional.⁵⁵ Accordingly, the President's ability to make law is limited both before and after the fact. In the United Kingdom, the judiciary has less power over the executive. The British judiciary has a severely limited ability to invalidate executive action or strike or otherwise affect primary legislation.⁵⁶ The British executive branch, therefore, has a very small incentive to make sure that the judiciary will approve of its legislation.

Because the British executive is also dominant over parliament, which dominates the judiciary, the British executive is typically thought of as the most powerful branch.⁵⁷ The British executive branch's historic power monopoly meant that it did not have to consider the preferences of the other government branches. However, as shown below, this power imbalance has been partially redressed with the Human Rights Act, which the legislature and judiciary to influence the executive in the creation of law. The legislature's influence in the area of human rights has increased with the creation of the Joint Committee of Human Rights and the executive's duty to report on the human rights implications of all bills presented to Parliament.⁵⁸ The judiciary has gained the ability to interpret statutes more creatively and can now issue Declarations of Incompatibility against legislation that does not conform to the European Convention on Human Rights.⁵⁹

2. Legislature

Like the executive, the legislative branch acts strategically so that its policy preferences will be reflected in the law. Legislators will create and enact laws to appease their constituents after conducting cost-benefit

55. See M. J. C. VILE, *POLITICS IN THE USA* 133 (5th ed., 1999); see also Young, *Taming the Most Dangerous Branch: The Scope and Accountability of Executive Power in the United States*, *supra* note 46, at 161, 174. However, the judiciary has generally looked with "tolerant eyes" upon the expansion of the President's powers and duties. See ERNEST S. GRIFFITH, *THE AMERICAN SYSTEM OF GOVERNMENT* 66 (6th ed., 1983).

56. LEYLAND, *supra* note 8, at 147; Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 712-13 (2001); WATTS, *supra* note 23, at 141. Some have argued that the British judiciary has traditionally been disinterested in having the ability to overrule or strike down legislation, even legislation that contravenes fundamental principles of a democracy. See WATTS, *supra* note 23, at 142.

57. Rasmussen, *supra* note 45, at 2; WATTS, *supra* note 23, at 40, 120.

58. Human Rights Act, 1998, c. 42, § 19 (Eng.).

59. Human Rights Act, 1998, c. 42, §§ 3, 4 (Eng.).

analyses.⁶⁰ Due to the time and energy legislators expend when creating statutes and the long-range and long-term effects these statutes can and should have, legislators strategize with the other government branches when drafting legislation.⁶¹

In the United States, Congress proposes legislation so it makes the initial calculation as to how to word a piece of legislation so that it will not be blocked by the executive (via a veto) or the judiciary (via an unwanted interpretation or a ruling that the statute is unconstitutional).⁶² In such a scenario, Congress must predict how each branch would prefer the legislation to look as well as the strength of those preferences.⁶³ Assuming that Congress is not confident that it can muster a two-thirds majority to override a veto, it will compromise with the President so that the President will not veto the statute.⁶⁴ It will also compromise so that the judiciary will not overrule the statute.⁶⁵

In the United Kingdom, the executive proposes the majority of legislation and is also the chief proponent of most successful legislative amendments.⁶⁶ Parliament then scrutinizes and tries to improve the proposed legislation.⁶⁷ Although Parliament's ability to draft legislation is severely limited, it can "legislatively veto" the executive's proposed legislation by refusing to pass it as written.⁶⁸

However, legislative veto is unlikely because the executive's party controls the House of Commons. Although both countries' legislatures are organized along party lines with prominent positions going to majority party leaders, party affiliation in the United Kingdom determines almost invariably how a member of the Commons will vote.⁶⁹ The strong party

60. J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS 20-21 (2004); McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, *supra* note 44, at 11, 26.

61. See McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, *supra* note 44, at 16.

62. See *id.*; Milligan, Congressional End-Run: The Ignored Constraint on Judicial Review, *supra* note 6, at 265; James Meernik & Joseph Ignagni, Judicial Review and Coordinate Construction of the Constitution, 41 AM. J. POL. SCI. 447, 451 (1997).

63. For example, the House Judiciary Committee produces reports called Court Proceedings and Actions of Vital Interest to the Congress, which keeps Congress apprised of litigation involving constitutional issues such as the speech or debate clause. Louis Fisher, Constitutional Interpretation by Members of Congress, 63 N.C. L. REV. 707, 728 (1985).

64. See Martin, *supra* note 5, at 376. Even a president's announcement that he will veto a certain piece of legislation can lead Congress to changing that legislation. See Ingberman & Yao, *supra* note 1, at 378.

65. PICKERILL, *supra* note 60, at 23. However, there is evidence that, without presidential support, Congress will be unable to override a judicial decision. Meernik & Ignagni, *supra* note 62, at 453.

66. See WALLS, *supra* note 12, at 78.

67. See *id.*; see also PUNNETT, *supra* note 7, at 249.

68. See Rasmussen, *supra* note 45, at 2; see also WALLS, *supra* note 12, at 77.

69. WALLS, *supra* note 12, at 78. Without party support, a Member of Parliament is unlikely to be re-elected. See PUNNETT, *supra* note 7, at 189; RODNEY BRAZIER,

system in the United Kingdom usually limits the House of Commons to the discussion or amendment, and then the final approval of Bills that are introduced by the executive.⁷⁰ The House of Lords does not have strong party affiliations but it has the power only to delay legislation.⁷¹

The Prime Minister therefore has an incentive to propose new legislation without much fear of a legislative override.⁷² Although Parliament can threaten the executive with refusal to pass the executive's bill, the strong party system within the Commons makes that threat less credible than the President's veto threat, particularly for a newly elected or popular Prime Minister or for a popular policy.⁷³ However, in the human rights realm, the executive is more likely to compromise with Parliament because of the Joint Committee on Human Rights' ability to scrutinize and seek evidence about any proposed legislation that impacts human rights.

a. The Joint Committee on Human Rights

In the area of human rights law, the Joint Committee on Human Rights is a powerful force for the legislature. The Joint Committee on Human Rights is a bipartisan committee whose primary purpose is to evaluate bills with human rights implications.⁷⁴ The Joint Committee on Human Rights writes

CONSTITUTIONAL PRACTICE: THE FOUNDATIONS OF BRITISH GOVERNMENT 215 (3d ed., 1999); Diermeier & Feddersen, *supra* note 18, at 612.

70. See PUNNETT, *supra* note 7, at 249.

71. See Jackie Ashley, Lords Face Full Election under Brown Plans, *GUARDIAN* (May 21, 2007), <http://www.guardian.co.uk/uk/2007/may/21/politics.lords>. Despite these limitations, the House of Lords' ability to delay can be and has been deadly to bills and may constitute a useful check against an executive that operates with a clear majority in the Commons. See BRAZIER, *supra* note 69, at 258-60; PUNNETT, *supra* note 7, at 304. Because all bills are sessional, a one-year delay may be sufficient to kill a bill. For this reason, the executive must be especially wary of a House of Lords' "veto" when drafting legislation. See BRAZIER, *supra* note 69, at 218-20.

72. This effect has declined recently and backbenchers are now more likely to not support policies of which they do approve, which can be embarrassing for the executive. *Id.* at 190-91; Politics, Gordon Brown Facing Biggest Ever Backbench Revolt Over Royal Mail Sell-Off, *TELEGRAPH* (Jan. 14, 2009, 8:26 AM), <http://www.telegraph.co.uk/news/politics/4237403/Gordon-Brown-facing-biggest-ever-backbench-revolt-over-Royal-Mail-sell-off.html>. This effect is particularly pronounced when the Prime Minister is considered to be weak or unpopular. *Id.*

73. See generally WEINGAST, *supra* note 16, at 664 (for a discussion on "credibility" of threats). There is evidence that a popular President is also more likely to veto legislation. See John T. Woolley, Institutions, the Election Cycle, and the Presidential Veto, 35 *AM. J. POL. SCI.* 279, 299 (1991).

74. See generally Joint Select Committee, *PARLIAMENT.UK*, <http://www.parliament.uk/jchr> (last visited June 20, 2012); Anthony Lester, Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998, 33 *VICTORIA U. WELLINGTON L. REV.* 1, 2 (2002); Janet L. Hiebert, *Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?*, 4 *INT'L J. CONST. LAW* 1, 18 (2006); Janet L. Hiebert, New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?, 82 *TEX. L. REV.* 1963, 1978 (2003-2004); K. D. Ewing, *The Human*

several reports each year that scrutinize legislation for potential conflicts with the European Convention on Human Rights.⁷⁵ To write these reports, the Joint Committee on Human Rights may demand more information from the executive branch or send specific questions for the executive branch to answer.⁷⁶ The Joint Committee on Human Rights also becomes involved if the judiciary issues a Declaration of Incompatibility or orders other remedial measures under the Human Rights Act.⁷⁷

The Joint Committee on Human Rights' most important task is the dialogue it creates between the executive and the legislature. After the Joint Committee on Human Rights obtains information from public interest groups and the executive branch, it passes on to Parliament, which uses the information to guide its debates.⁷⁸ Although the executive can essentially ignore the Joint Committee on Human Rights' questions or demands for information (and has in the past),⁷⁹ by doing so, it risks the displeasure of Parliament. Parliament's disapproval is likely to occur because both houses

Rights Act and Parliamentary Democracy, 62 MODERN L. REV. 79, 97-98 (1999). The Joint Committee on Human Rights is also responsible for investigating potential human rights abuses by executive departments and making sure that the UK complies with its European Convention on Human Rights and other international rights obligations. *See* Ewing, *supra*, at 97-98; Hiebert, *Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?*, *supra* note 74, at 18.

75. *See* Joint Committee on Human Rights: publications Session 2010-12, PARLIAMENT.UK, <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/publications/previous-sessions/Session-2010-12/> (last visited June 20, 2012).

76. *See generally* Hiebert, *Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?*, *supra* note 74, at 18-19 (for an in-depth discussion regarding how the Joint Committee interacts with the executive and Parliament).

77. *Id.* at 21-22. By its own account, the Joint Committee on Human Rights takes its role very seriously and considers as part of its responsibilities to "scrutin[ize] the adequacy of the [executive]'s response to such judgments and, in some cases, decid[e] for itself whether a change in the law is necessary to protect human rights and, if so, what that change should be." JOINT COMMITTEE ON HUMAN RIGHTS, MONITORING THE GOVERNMENT'S RESPONSE TO COURT JUDGMENTS FINDING BREACHES OF HUMAN RIGHTS, SIXTEENTH REPORT, H.L. 128, H.C. 728, at 9 (2007) (U.K.) (hereinafter JOINT COMM. ON HUM. RTS., SIXTEENTH REPORT).

78. Janet L. Hiebert, *Interpreting a Bill of Rights: The Importance of Legislative Rights Review*, 35 BRIT. J. POL. SCI. 235, 251 (2005); *See, e.g.*, JOINT COMMITTEE ON HUMAN RIGHTS, THE HUMAN RIGHTS OF ADULTS WITH LEARNING DISABILITIES, PRESS NOTICE (2007) (U.K.), available at <http://www.parliament.uk/documents/upload/pn-28-cfe-adults-with-learning-disabilities-290307.pdf>; JOINT COMMITTEE ON HUMAN RIGHTS, THE HUMAN RIGHTS OF OLDER PERSONS IN HEALTHCARE, PRESS NOTICE (2007) (U.K.), available at <http://www.parliament.uk/business/committees/committees-archive/joint-committee-on-human-rights/jchr201206pn05/>.

79. *See* JOINT COMMITTEE ON HUMAN RIGHTS, LEGISLATIVE SCRUTINY: WELFARE REFORM BILL, TWENTY-FIRST REPORT, 2010-12, H.L. 233, H.C. 1704, ¶ 1.10 (U.K.) "The Department of Work and Pensions did not provide us with such a human rights memorandum in relation to this Bill. It was encouraged to do so, but declined." *Id.*

rely upon the Joint Committee on Human Rights' reports used in their deliberations.⁸⁰

The Joint Committee on Human Rights can also use parliamentary debates to delay the passage of bills, especially in the House of Lords, where party affiliation is weaker.⁸¹ Even in the Commons, the Joint Committee on Human Rights can give the Opposition something to focus on to rally resistance to proposed legislation.⁸² In such a situation, the executive branch may prefer to change the bill instead of attempting to force it through Parliament.

Although the executive has explicitly stated that it will not follow the Joint Committee on Human Rights' advice,⁸³ the executive has, on more than one occasion, amended its proposed legislation in response to the Joint Committee on Human Rights' statement that a bill was incompatible with the Human Rights Act.⁸⁴ For example, due to concerns raised by the Joint Committee on Human Rights regarding potential human rights violations in the Anti-terrorism, Crime and Security Bill, several changes were made in the Commons, such as increased safeguards for certifying a person as a "terrorist."⁸⁵ On the other hand, there are still instances of executive delays

80. Dawn Oliver, *Constitutional Scrutiny of Executive Bills*, 4 MACQUARIE L. J. 33, 49 (2004); Indeed, the House of Lords has even delayed its debates in order to allow the Joint Committee on Human Rights to review a proposed bill. Hiebert, *Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?*, *supra* note 74, at 32; KLUG, *The United Kingdom Experience*, *supra* note 32, at 7.

81. PUNNETT, *supra* note 7, at 304.

82. See 457 PARL. DEB., H.C. (6th ser.) 1322 (2007) (U.K.) (criticizing the Tribunals, Courts and Enforcement Bill 2007); The Joint Committee on Human Rights may also have a (smaller) effect on the judiciary. Courts have shown themselves increasingly willing to use the Joint Committee on Human Rights' reports as either persuasive authorities or to inform their judgments because often the same compatibility issue will have already presented itself before the Joint Committee on Human Rights. See, e.g., R. (Animal Defenders International) v. Sec'y of State for Culture, Media and Sport, [2008] UKHL 15 [14-21] (agreeing with the Joint Committee on Human Rights that the Communications Act 2003's ban on all political advertising was incompatible with the European Convention on Human Rights); In these situations, courts can use the Joint Committee on Human Rights' report to access the Joint Committee on Human Rights' opinions on compatibility, the executive's responses to their questions and the extensive parliamentary debates the report inspired. Interview with Murray Hunt, Joint Committee on Human Rights Legal Advisor, (May 19, 2008); see also Hiebert, *Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?*, *supra* note 74, at 21.

83. JOINT COMMITTEE ON HUMAN RIGHTS, ORAL AND WRITTEN EVIDENCE: HUMAN RIGHTS POLICY, 2006, H.L. 143, H.C. 830-i, ¶ 40, 47 (U.K.).

84. Hiebert, *Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?*, *supra* note 74, at 28.

85. JOINT COMMITTEE ON HUMAN RIGHTS, ANTI-TERRORISM, CRIME AND SECURITY BILL, FIFTH REPORT, 2001, H.L. 51, H.C. 420, ¶¶ 8, 19 (U.K.).

and resistance to measures suggested by the Joint Committee on Human Rights.⁸⁶

All in all, the executive branch is likely to anticipate questions from the Joint Committee on Human Rights and may even alter its legislative proposals to avoid any fallout that the Joint Committee on Human Rights' questioning or negative conclusions may have on Parliamentary debates.⁸⁷ There is also evidence that the executive branch is becoming more amenable to working with the Joint Committee on Human Rights as it drafts legislation, and communication between the two groups has improved over time.⁸⁸ For that reason, the Joint Committee on Human Rights is a powerful political player for Parliament.

b. Human Rights Act Section 19 Statement of Compatibility

Section 19 of the Human Rights Act has also had a positive impact on the interactions between the British legislature and executive. Under Section 19, when a Minister introduces any bill into Parliament, he or she must state either that the bill is compatible with the European Convention on Human Rights or that he or she wishes Parliament to proceed with it anyway.⁸⁹ These statements of compatibility create "serious pre-legislative scrutiny of all new legislation for conformity with the [European Convention on Human Rights]."⁹⁰ The statement of compatibility does not explicitly prohibit the executive from proposing legislation that is incompatible with the European Convention on Human Rights, but it does present significant political obstacles, such as increased Parliamentary scrutiny (especially from the Joint Committee on Human Rights) and public disapproval, for doing so.⁹¹ For example, the Joint Committee on Human Rights has effectively used statements of compatibility to question the executive and guide debates.⁹²

86. JOINT COMMITTEE ON HUMAN RIGHTS, MONITORING THE GOVERNMENT'S RESPONSE TO COURT JUDGMENTS FINDING BREACHES OF HUMAN RIGHTS, SIXTEENTH REPORT, H.L. 128, H.C. 728, at 25-26 (2007) (U.K.).

87. Hiebert, *Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?*, *supra* note 74, at 21.

88. Oliver, *Constitutional Scrutiny of Executive Bills*, *supra* note 80, at 43; David Feldman, *Injecting Law into Politics and Politics into Law: Legislative and Judicial Perspectives on Constitutional Human Rights*, 34 COMMON L. WORLD REV. 104, 117 (2005); David Feldman, *The Impact of Human Rights on the UK Legislative Process*, 25 STATUTE L. REV. 91 (2004); Hiebert, *Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?*, *supra* note 74, at 24.

89. Human Rights Act, 1998, c. 42, § 19 (Eng.); BRAZIER, *supra* note 69, at 10.

90. Murray Hunt, *The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession*, 26 J.L.S. 86, 89-90 (1999).

91. Ewing, *supra* note 74, at 96-97.

92. See, JOINT COMMITTEE ON HUMAN RIGHTS, SCRUTINY OF BILLS: FINAL PROGRESS REPORT, SEVENTEENTH REPORT, 2002-3 H.L. 186, H.C. 1278, at Appendix 1 (U.K.); The

Statements of compatibility ensure that the executive branch begins to strategize before it presents any bills to Parliament because the statement of compatibility must be made before a bill's second reading.⁹³ The executive's strategy must also take into account possible questioning by the Joint Committee on Human Rights and any debates that this questioning may prompt. Making a plausible statement of compatibility therefore requires some investigation or thought to the Joint Committee on Human Rights' preference for the law.⁹⁴ The executive must ensure that its statements of compatibility have sound backing that can withstand any questions the Joint Committee on Human Rights may have.⁹⁵ Accordingly, the executive is more likely to compromise even before a bill reaches Parliament when the Human Rights Act's Section 19 is implicated.

The power of Section 19 is evident in the fact that the executive is reluctant to present bills that cannot be supported by a credible statement of compatibility.⁹⁶ The executive has failed to make a statement of compatibility only twice. In one instance, when a Minister proposed

executive's statement of compatibility (or lack thereof) is also likely to have substantial impact on the judiciary's interpretation of the legislation if it is ever challenged in court. Although not controlling, a statement of compatibility can give guidance to the court how to interpret the legislation under Section 3 or, at the very least, indicate to the judiciary that it should engage in Section 3 interpretation because the executive intended the legislation to be compatible with the European Convention on Human Rights. Aileen Kavanagh, *Pepper v Hart and Matters of Constitutional Principle*, 121 L. Q. REV. 98, 119-20 (2005); R (on the application of Q and others) v. Sec'y of State for the Home Dep't, [2003] 2 EWCA (Civ) 905; On the other hand, a statement that the executive cannot affirmatively aver that the proposed legislation is compatible with the European Convention on Human Rights indicates to the judiciary that the executive was not concerned with making the legislation compatible and will make it more likely that the judiciary will opt to issue a DOI. McGoldrick, *supra* note 32, at 924.

93. Human Rights Act, 1998, c. 42, § 19(1) (Eng.) (a "second reading" is a debate on the bill held before the general body of a legislature (such as the House of Commons or the House of Lords), as opposed to before a committee or other group).

94. One commentator has asserted that the statement of compatibility "should ensure that Ministers will scrupulously avoid introducing legislation that would deny citizens their Convention rights." BRAZIER, *supra* note 69, at 10. Another has stated that, in practice, Section 19 statements, as they are currently used "are virtually meaningless and say little more than that the [executive] expects those that implement the measures to obey the law." John Wadham, *The Human Rights Act: One Year On*, EUR. H.R. L. REV. 620, 624 (2001).

95. The Joint Committee on Human Rights has been particularly effective in convincing the executive to provide more explanation for its Section 19 Statements of Compatibility on the face of its bills, which has enhanced parliamentary debate. David Feldman, *Parliamentary Scrutiny of Legislation and Human Rights*, PUB. L. 323, 338 (2002).

96. This is not to say that the executive branch does not engage in deception or subterfuge when making these statements to downplay any negative human rights effects that a bill may have. Hiebert, *Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?*, *supra* note 74, at 12. In such situations, it is up to the Joint Committee on Human Rights and Parliament (the Opposition, most likely) to bring all elements of the Bill to light so that the full implications of the Bill may be discussed and weighed. *Id.*

legislation (the Communications Bill) with a statement that it was not compatible with the European Convention on Human Rights, she received substantial criticism from within Parliament and from political commentators.⁹⁷ As a result, the executive assured Parliament that, should the Communications Bill be declared incompatible by the judiciary, the executive would “reconsider” its position and introduce remedial legislation.⁹⁸ Moreover, due to pressure from the Joint Committee on Human Rights, the executive now gives more thorough statements of compatibility under Section 19 that include the executive’s reasoning and not just a bald statement of compatibility.⁹⁹

In sum, despite some executive resistance, the Joint Committee on Human Rights has done much to increase its own influence and power so that it can force the executive to change proposed legislation. The Joint Committee on Human Rights’ desire to increase its power is easily explained strategically: the Joint Committee on Human Rights is attempting to ensure that British laws conform to its preferences as much as possible. The Joint Committee on Human Rights ensures that Parliament has an active role in the creation and amendment of laws that affect human rights.¹⁰⁰ To accomplish that goal, the Joint Committee on Human Rights uses Section 19 of the Human Rights Act, which was made more powerful by the Joint Committee on Human Rights itself.¹⁰¹

97. JOINT COMMITTEE ON HUMAN RIGHTS, SCRUTINY OF BILLS: PROGRESS REPORT, FIRST REPORT, 2002, H.L. 24, H.C. 191, ¶ 11 (U.K.); Aileen Kavanagh, *The Role of Parliamentary Intention in Adjudication Under the Human Rights Act 1998*, 26 O.J.L.S. 179, 181 (2006); In the first instance of a failure to make a statement of compatibility, the House of Lords blocked the Commons’ attempt to amend Section 28 of the Local Government Act 2003, which had forbidden the promotion of homosexuality. The executive warned that this amendment could be incompatible with the European Convention on Human Rights and presented a statement to that effect. Section 28 was later removed from the Local Government Act 2003. 395 PARL. DEB., H.C. (6th ser.) (2002) 789 (U.K.).

98. 395 PARL. DEB., H.C. (6th ser.) (2002) 789 (U.K.) (suggesting that if the Bill were to be declared incompatible by the European Court of Human Rights, the executive pledged to amend the legislation in accordance with that judgment);

JOINT COMMITTEE ON HUMAN RIGHTS, SCRUTINY OF BILLS: FURTHER PROGRESS REPORT, REPORT, 2002-3, H.L. 50, ¶40 (U.K.); Tom Lewis, *Political Advertising and the Communications Act 2003: Tailored Suit or old Blanket?*, 3 EUR. H.R. L. REV. 290, 293 (2005).

99. 629 PARL. DEB., H.L. (5th ser.) (2001) 116WA(U.K.); 643 PARL. DEB., H.L. (5th ser.) (2003) 154WA (U.K.); Feldman, *supra* note 95, at 339.

100. Hiebert, *supra* note 78, at 251.

101. 629 PARL. DEB., H.L. (5th ser.) (2001) 116WA(U.K.); 643 PARL. DEB., H.L. (5th ser.) (2003) 154WA (U.K.); Feldman, *supra* note 95, at 339.

3. The Judiciary

Like the executive and legislature, the judiciary has policy preferences it wishes to advance with its decisions.¹⁰² In order to ensure that those branches do not legislate over its decisions even if they disagree with it, the judiciary takes into account the preferences of both the executive and the legislature when making its decisions.¹⁰³ The fear of overturned decisions is often enough for the judiciary to alter its decisions to avoid harming the judiciary's reputation, credibility, and legitimacy.¹⁰⁴ If courts take it upon themselves to alter their holdings, they can probably do so in a less extreme manner than the elected branches had contemplated and the elected branches will not bother to spend the time and energy necessary to overturn the judiciary's compromise decision.¹⁰⁵

In addition to compromising, the judiciary has other strategic tools it can use. When there is tension between the elected branches, the judiciary can team up with one elected branch to overpower the other. For example, the Supreme Court and the President can work together to achieve political objectives and overcome "political barriers that hamper the realization of a governing coalition's agenda."¹⁰⁶ These obstacles include: recalcitrant states who refuse to follow the national agenda, a fragmented government that is unable to change the status quo and overcome entrenched interests, compromises that had to be made to ensure that certain laws passed, and conflicting or hostile constituents.¹⁰⁷ Similarly, a judiciary that faces an ideologically agreeable legislature has more freedom to reinterpret or, when constitutionally possible, strike statutes enacted by past legislatures.

The judiciary can also oppose both the other branches of government if it has "accumulated stockpile of political capital with the general public" due

102. William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 373 (1991).

103. Luke Milligan, *Modeling the Congressional End-Run Constraint*, 45 U. RICH. L. REV. 863, 870 (2011); Tony Caporale, *A Positive Political Model of Supreme Court Economic Decisions*, 68 S. ECON. J. 693, 695 (2002); Eskridge, *supra* note 102, at 390, 403; Meernik & Ignagni, *supra* note 62, at 458; *but see* Virginia A. Hettinger & Christopher Zorn, *Explaining the Incidence and Timing of Congressional Responses to the U.S. Supreme Court*, 30 LEGIS. STUD. Q. 5, 21 (2005).

104. *See* Lee Epstein, et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 599-600 (2001); *but see* Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 42 (1997).

105. McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1654 (1995). Judicial decisions about controversial issues are especially difficult for the executive and legislature to override because of conflicting interest groups and constituencies. Eskridge, *supra* note 102, at 377.

106. Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 584 (2005).

107. *Id.* at 586-91.

to the institution's history and prestige.¹⁰⁸ In such a situation, the judiciary's political capital may force elected officials to work within the court's rules.¹⁰⁹ The judiciary can also appeal to public sentiment by issuing decisions that follow existing and unpopular legislation with the hope of causing a backlash.¹¹⁰ However, for judicial activism to last, it must take place in a favorable political environment.¹¹¹ If the judiciary opposes the elected branches that have popular support, it is unlikely to be successful and may become vulnerable to sanctions from the publicly-supported elected branches.¹¹²

In contrast to the American judiciary, the British judiciary's ability to oppose other branches of the government is limited in several ways. First, until recently, the judiciary itself was more integrated with the other branches of the government. As a participant in all three branches of the government, the Lord Chancellor was the epitome of integration of powers in the UK.¹¹³ The British Supreme Court was also part of both the legislature and judiciary.¹¹⁴ This commingling of the judiciary, legislature, and executive and the independence of the judiciary ended with the enactment of the Constitutional Reform Act 2005.¹¹⁵ Most notably, the Supreme Court Justices may no longer sit in Parliament; they are now

108. Whittington, *supra* note 106, at 583, 585;
Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 648 (1992).

109. Whittington, *supra* note 106, at 585; *see also* Caldeira & Gibson, *supra* note 104, at 640 (providing evidence that the government branches can be pitted against each other and support for one can outweigh support for the others).

110. McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, *supra* note 105, at 1655.

111. Whittington, *supra* note 106, at 583.

112. An example is the Supreme Court's repeated striking of FDR's popular New Deal legislation. *See* McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, *supra* note 105, at 1669-71.

113. Prior to the CRA, the Lord Chancellor was appointed by the Prime Minister to his executive position, was the Speaker the House of Lords, appointed Law Lords (after consultation with the Prime Minister), and was both the supreme judge of England and a Law Lord himself. ROBERT STEVENS, *THE INDEPENDENCE OF THE JUDICIARY* 2 (1993); *see also* FRED L. MORRISON, *COURTS AND THE POLITICAL PROCESS IN ENGLAND* 200 (1973). After the CRA, he or she is still a member of the executive and has a smaller role with regard to judicial appointments.

114. BRAZIER, *supra* note 69, at 281. In fact, until 2009, they were called the House of Lords Appellate Division. *Id.*

115. Constitutional Reform Act, 2005, c. 4, § 3 (U.K.); *see also* Lord Windlesham, *The Constitutional Reform Act 2005: Ministers, Judges and Constitutional Change: Part 1*, [2005] P.L. 806, 816; *see also* JOINT COMMITTEE ON HUMAN RIGHTS, *SCRUTINY OF BILLS: FINAL PROGRESS REPORT, TWENTY-THIRD REPORT, 2003-4*, H.L. 210 (U.K.) (stating the Joint Committee on Human Rights' analysis of the CRA).

judges only.¹¹⁶ Accordingly, the British judiciary now appears to be more closely structured to the American judiciary.¹¹⁷

Second, the British judiciary is fundamentally different from its American counterpart because it is subordinate to Parliament. Unlike the American Supreme Court, the British Supreme Court cannot overrule an Act of Parliament on the grounds of constitutionality.¹¹⁸ However, this lack of power has not prevented judges from questioning the executive in their judicial opinions, which are highly publicized.¹¹⁹ Due to the executive's strong party-control over Parliament, it is relatively easy for the executive to override judicial decisions.¹²⁰ Due to this executive power, the judiciary will be less likely to risk making a decision that is not aligned with the executive or Parliament's preferences.

Of all of these restrictions on its power, the British judiciary's reverence towards Parliament is the most limiting because it causes the judiciary to defer to parliament even when it arguably should not. The doctrine of parliamentary sovereignty, which is axiomatic in the British government, dictates that the judiciary must be subservient to Parliament.¹²¹ Historically, the British judiciary has consistently deferred to Parliament because of this doctrine.¹²² Even though the judiciary has become slightly more activist in recent years,¹²³ the judiciary still views its role as giving effect to the will of Parliament. Because the judiciary also views itself as subordinate to Parliament, the judiciary commonly uses deferential language when

116. Mary L. Clark, *Advice and Consent vs. Silence and Dissent? The Contrasting Roles of the Legislature in the U.S. and U.K. Judicial Appointments*, 71 LA. L. REV. 451, 477-78 (2011).

117. See Louis E. Wolcher, *A Philosophical Investigation into Methods of Constitutional Interpretation in the United States and the United Kingdom*, 13 VA. J. SOC. POL'Y & L. 239, 276-77 (2006). The intended effect of the statute was to make the UK's judiciary conform to the prevailing notion in constitutional democracies that the judiciary should be appear to be independent from the other branches of government. See *id.*

118. BRADLEY & EWING, *supra* note 53, at 53.

119. See RICHARD HODDER-WILLIAMS, *Courts of Last Resort*, in *POLITICS IN BRITAIN AND THE UNITED STATES* 146, 150-51 (Richard Hodder-Williams & James Caesar eds., 1986). For example, Laws, L.J., has warned the executive that its asylum country list system left "the United Kingdom's compliance with [European Convention on Human Rights] Article 3 fragile." *Sec'y of State for the Home Dep't v. Javad Nasser*, [2008] 3 W.L.R. 1386, [42] (Eng.).

120. See Cooter & Ginsburg, *supra* note 16, at 299.

121. As articulated by A.V. Dicey, Parliament in the UK is supreme and no other power can overrule it, including the judiciary. A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 38 (5th ed. 1897).

122. LEYLAND, *supra* note 8, at 147. In contrast, the United States Supreme Court sees itself as delivering the "final word" on the meaning of the Constitution, though it does defer to Congressional interpretations of the Constitution. Fisher, *supra* note 60, at 715 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)); see also PICKERILL, *supra* note 60, at 14.

123. Wolcher, *supra* note 117, at 287.

interpreting statutes.¹²⁴ The judiciary has a limited ability to affect the actions of Parliament and the executive because it traditionally defers to Parliament and is unable to strike down unconstitutional statutes.¹²⁵

When laws impact human rights, however, the picture changes. The executive can still take some comfort in the British judiciary's deference to Parliament and in the judiciary's inability to decide on the constitutionality of human rights statutes, both of which make the judiciary less able to thwart the executive's intentions. However, when proposing new laws, the British executive must still take into consideration the judiciary's new powers to creatively interpret a statute or declare it incompatible with the European Convention on Human Rights.¹²⁶

a. Power to Interpret

Section 3 of the Human Rights Act empowers British courts to interpret all legislation to be compatible with the European Convention on Human Rights insofar as it is "possible" to do so.¹²⁷ Interpretative techniques such as narrowing the applicability or reading terms into a statute are now available to the judiciary, even when the statute being interpreted is not ambiguous.¹²⁸ Commentators,¹²⁹ executive representatives,¹³⁰ and judges¹³¹ disagree among themselves as to how far the judiciary can strain an unambiguous statute in order to make it compatible with the European

124. See *R v. A*, [2001] UKHL 25, [58], 1 A.C. 45 (H.L.) (Lord Hope of Craighead) (appeal taken from Eng.) ("[I]t is appropriate in some circumstances for the judiciary to defer, on democratic grounds, to the considered opinion of the elected body as to where the balance is to be struck between the rights of the individual and the needs of society.").

125. See *WATTS*, *supra* note 23, at 141.

126. Human Rights Act, 1998, c. 42, §§ 3-4 (Eng.).

127. Human Rights Act, 1998, c. 42, § 3 (Eng.); see also *Sheldrake v. DPP*, [2004] UKHL 43, [29], [2005] 1 A.C. 264 (H.L.) (appeal taken from Eng.).

128. Alison L. Young, *Judicial Sovereignty and the Human Rights Act 1998*, 61 CAMBRIDGE L. J. 53, 62 (2002).

129. *Id.*; Aileen Kavanagh, *The Role of Parliamentary Intention in Adjudication Under the Human Rights Act 1998*, *supra* note 97, at 190; Gavin Phillipson, *(Mis-)Reading Section 3 of the Human Rights Act*, 119 L.Q.R. 183, 187 (2003); Conor A. Gearty, *Reconciling Parliamentary Democracy and Human Rights*, L.Q.R. 248, 254 (2002); Lord Lester, *Developing Constitutional Principles of Public Law*, PUB. L., WIN 684, 691 (2001); Clive Walker & Russell L. Weaver, *The United Kingdom Bill of Rights 1998: The Modernisation of Rights in the Old World*, 33 U. MICH. J.L. REFORM 497, 545 (2000); Richard Clayton, *The Limits of What's "Possible": Statutory Construction Under the Human Rights Act*, EUR. H.R. L. REV. 559 (2002).

130. Young, *Judicial Sovereignty and the Human Rights Act 1998*, *supra* note 128, at 55 (comparing Jack Straw's statements to those in the executive's White Paper "Rights Brought Home: The Human Rights Bill.").

131. See Lord Irvine, *Activism and Restraint: Human Rights and the Interpretative Process*, EUR. H.R. L. REV. 350 (1999); Lord Steyn, *The New Legal Landscape*, EUR. H.R. L. REV. 549 (2000).

Convention on Human Rights.¹³² All agree that Section 3 allows judges to be more creative when interpreting a statute and even alter the statute's wording if doing so would make the statute compatible with the European Convention on Human Rights.¹³³ This power to interpret creatively may also lead to interpretations that are not desired by the executive or Parliament.¹³⁴ Courts may even become bolder and more willing to defy Parliament with a unique and unwanted interpretation of a statute.¹³⁵

When responding to judicial decisions regarding legislation that impacts human rights, the calculations of the British executive and legislature will be similar to those of their American counterparts. If the judiciary interprets a statute under Section 3 in a way that the executive does not like, the executive must decide how to draft new legislation, if it chooses to at all. But the British judiciary must also anticipate the reality that the executive, due to the executive's party control over Parliament, will find re-legislating much easier than Congress would. Therefore, the British judiciary has reason to be conservative in its interpretations.

132. For examples of judges creatively interpreting statutes, see *Ghaidan v. Mendoza*, [2002] EWCA (Civ) 1533 (Eng.) (changing wording of Rent Act 1977 so that it applied to same-sex and unmarried couples as well as married heterosexual couples); *R v. Sec'y of State for the Home Dep't*, [2002] EWCA (Civ) 273 (Eng.) (rewriting section 2 of the 1997 Crime (Sentences) Act so that multiple offenders will not be sentenced to life imprisonment unless they constitute a significant risk to the public). For cases setting limits on Section 3, see *Re S (Minors) (Care Order: Implementation of Care Plan)*, [2002] UKHL 10, [38], 2 A.C. 291 (H.L.) (Lord Nicholls of Birkenhead) (appeal taken from Eng.) (“[N]ot all provisions in primary legislation can be rendered Convention compliant by the application of section 3(1).”); *Donoghue v. Poplar Hous. & Regeneration Cmty Ass'n*, [2001] EWCA (Civ) 595, [75], [2002] Q.B. 48 (Lord Woolf C.J.) (appeal taken from Eng.); *R v. Lambert* [2001] UKHL 37, [79]-[81], [2002] 2 A.C. 545 (H.L.) (Lord Hope of Craighead) (appeal taken from Eng.).

133. David Bonner, et al., *Judicial Approaches to the Human Rights Act*, 52 INT'L & COMP. L.Q. 549, 556 (2003). It arguably even requires judges to do so. Lester, *The Art of the Possible—Interpreting Statutes Under the Human Rights Act*, *supra* note 31, 669 (1998).

134. However, this power is not unlimited. The judiciary cannot depart substantially from a “fundamental feature” of the statute or rewrite a whole statute or scheme because that is still Parliament's responsibility. See generally *Ghaidan v. Mendoza*, [2004] UKHL 30, [2004] 2 A.C. 557 (H.L.) (appeal taken from Eng.); *In re S*, [2002] UKHL 10, [40] (Lord Nicholls) (Eng.); *R v. Sec'y of State for the Home Dep't*, [2002] UKHL 46, [59], [2003] 1 A.C. 837 (H.L.) (Lord Steyn) (appeal taken from Eng.) (“Section 3(1) is not available where the suggested interpretation is contrary to express statutory words or is by implication necessarily contradicted by the statute.”); *Bellinger v. Bellinger*, [2003] UKHL 21, [2003] 4 A.C. 467 (H.L.) (Lord Nicholls) (Eng.); *R v. D.M.*, [2011] EWCA (Crim) 2752 [32] (Eng.) (Courts cannot use the Human Rights Act to “go against the grain of the legislation.”) (citing *Ghaidan*, [2004] 2 A.C. 557)). For a fuller discussion of these cases, see generally Conor Gearty, *Revisiting Section 3(1) of the Human Rights Act*, 119 L.Q.R. 551, 551-52 (2003).

135. On the other hand, this greater transparency of values may also make courts more open to public scrutiny and, therefore, more cautious not to appear to unjustly oppose Parliament, which, as an elected branch, arguably has more public support.

b. Declaration of Incompatibility

Under Section 4 of the Human Rights Act, if a senior court¹³⁶ determines that a piece of primary legislation¹³⁷ cannot be interpreted to be compatible with the Convention, it may issue a Declaration of Incompatibility.¹³⁸ This declaration has no immediate effect, but does put political pressure on Parliament and the executive to bring the legislation into compliance with the Convention.¹³⁹ The Declaration of Incompatibility even opens up a remedial “fast track” that the executive may use to quickly alter the incompatible legislation through regulations that do not go through the full debate process in Parliament.¹⁴⁰ As with Section 3, commentators, judges, and government officials disagree regarding the actual power of a Declaration of Incompatibility. Some argue that the sovereignty of Parliament remains intact because Parliament can ignore Declarations of Incompatibility whenever it wishes.¹⁴¹ Others equate a Declaration of Incompatibility with the United States Supreme Court’s ability to void a statute because Parliament and the executive will “almost never” ignore a Declaration of Incompatibility.¹⁴²

136. Under Human Rights Act Section 4(5), the only courts that can issue DOIs are the Supreme Court, the Judicial Committee of the Privy Council, the Courts-Martial Appeal Court, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session (in Scotland), and the High Court or the Court of Appeal (in England and Wales or Northern Ireland). Human Rights Act, 1998, c. 42, § 4(5) (Eng.).

137. Secondary legislation (such as implementing regulations) and administrative acts may be declared void and unenforceable by the judiciary under the Human Rights Act unless their primary statutes are also incompatible. Human Rights Act, 1998, c. 42, § 3 (Eng.); Vick, *supra* note 29, at 355-56.

138. Although this power is phrased as discretionary, if the court determines that it cannot interpret the offending legislation compatibly, its only remaining choices are to issue a statement of incompatibility or do nothing, which would make the court in violation of its own duties under Section 6 of the Human Rights Act.

139. Unfortunately, this does nothing to help the litigant, who is still bound by the incompatible statute. For this reason, two commentators have noted that it is actually better for the litigant if the court attempts to interpret the statute, which will have a positive effect on the litigant, than to issue a DOI. Ian Leigh & Laurence Lustgarten, *Making Rights Real: The Courts, Remedies and the Human Rights Act*, 58 CAMBRIDGE L.J. 509, 538 (“Issuance of a [DOI] means that, in practical terms, the plaintiff has lost.”).

140. Human Rights Act, 1998, c. 42, § 10 (Eng.). The executive has used this power in at least one instance to amend the Mental Health Act 1983. See *R v. Mental Health Tribunal (N. & E. London Region)*, [2001] EWCA (Civ) 415, [2002] Q.B. 1 (appeal taken from Eng.); See *The Mental Health Act, 1983, (Remedial) Order 2001*.

141. See Vick, *supra* note 29, at 363; Bonner et al., *supra* note 133, at 562; Gearty, *Reconciling Parliamentary Democracy and Human Rights*, *supra* note 129, at 251; Ewing, *supra* note 39, at 99.

142. See 582 PARL. DEB., H.L. (5th ser.) (1997) 1276 (U.K.); Lord Hoffman, *Human Rights and the House of Lords*, 62 MOD. L. REV. 159 (1999); Danny Nicol, *Are Convention Rights a No-Go Zone for Parliament?*, PUB. L. 438, 441-42 (2002) (quoting a speech made by Lord Steyn to the Mansfield Law Society on October 10, 2001); Lester, *The Art of the Possible—Interpreting Statutes Under the Human Rights Act*, *supra* note 31, at 671.

In practice, the judiciary often limited the effectiveness of the Declaration of Incompatibility.¹⁴³ For example, courts have been deferential when deciding whether to issue a Declaration of Incompatibility at all.¹⁴⁴ It is clear that Declarations of Incompatibility were intended to be used rarely, with interpretation the more common solution to an incompatibility problem.¹⁴⁵ Judges have taken this to heart and seem reluctant to issue Declarations of Incompatibility. Instead, judges defer to Parliament, especially on issues that they consider traditionally within Parliament's purview, such as social and economic policies.¹⁴⁶ Courts are also more likely to find compatibility with the European Convention on Human Rights by giving deference to well-articulated executive or Parliamentary decisions, especially when the decisions explicitly mention that the European Convention on Human Rights was considered.¹⁴⁷

On the other hand, although they are not explicitly required to do so, the executive and Parliament have responded to every Declaration of Incompatibility issued.¹⁴⁸ While some responses may have been long overdue or crit-

143. For example, in *McKerr*, the Supreme Court held that DOIs are not retroactive. *See In re McKerr*, [2004] UKHL 12 (appeal taken from N. Ir.); JOINT COMMITTEE ON HUMAN RIGHTS, ORAL AND WRITTEN EVIDENCE: HUMAN RIGHTS POLICY, 2006, H.L. 143, H.C. 830-i, at 146 (U.K.). This means that any breaches that took place before 2000 essentially have no judicial remedy and may only be rectified by executive action, which is likely to be in response to a decision by the European Court of Human Rights. Although the executive has acknowledged to the Joint Committee on Human Rights that it has a responsibility to implement pre-2000 European Court of Human Rights decisions, there have been substantial delays in doing so. JOINT COMM. ON HUM. RTS., SIXTEENTH REPORT, *supra* note 77, at 150. In certain circumstances, such as substantive criminal law violations, there is no way under British law to overturn the improper conviction. *Id.* at 147.

144. Francesca Klug, *Judicial Deference under the Human Rights Act 1998*, *supra* note 39, at 132 (2003).

145. 582 PARL. DEB., H.L. (5th ser.) (1997) 1231 (U.K.) (Lord Irvine of Lairg L.C.).

146. *See Int'l Transp. Roth GmbH v. Sec'y of State for the Home Dept.*, [2002] EWCA (Civ) 158, [2003] Q.B. 728 (appeal taken from Eng.) (detailing the "spectrum" of deference); David Pannick, *Principles of Interpretation of Convention Rights Under the Human Rights Act and the Discretionary Area of Judgment*, PUB. L. 545, 549 (1998); Klug, *Judicial Deference under the Human Rights Act 1998*, *supra* note 39, at 129; Richard A. Edwards, *Judicial Deference Under the Human Rights Act*, 65 MOD. L. REV. 859, 860 (2002).

147. *See Belfast City Council v. Miss Behavin' Ltd.*, [2007] UKHL 19, [26] (Lord Rodger of Earlsferry) (appeal taken from N. Ir.); *R v. Governors of Denbigh High Sch.*, [2006] UKHL 15, [2007] 1 A.C. 100 (H.L.) [31] (appeal taken from Eng.). In fact, the Supreme Court has noted that there may be some cases where they will uphold the executive's discretion no matter what its decision as long as the executive has shown that it has considered the relevant human rights issues. *Belfast City Council*, [2007] UKHL 19, [44] (Lord Mance) (Eng.).

148. LORD CHANCELLOR & SECRETARY OF STATE FOR JUSTICE, RESPONDING TO HUMAN RIGHTS JUDGMENTS: GOVERNMENT RESPONSE TO THE JOINT COMMITTEE ON HUMAN RIGHTS', THIRTY-FIRST REPORT, 2007-8, (U.K.), available at <http://www.official-documents.gov.uk/document/cm75/7524/7524.pdf>.

icized as insufficient,¹⁴⁹ no Declaration of Incompatibility has gone unanswered. The executive has changed the laws in response to Declarations of Incompatibility, even in very controversial areas such as immigration and anti-terrorism legislation.¹⁵⁰ Due to this deference, Declarations of Incompatibility are also important for an analysis of the British government.

c. The Impact of the European Court of Human Rights

The United Kingdom's new separation of powers is complicated by the influence of the European Court of Human Rights. The European Court of Human Rights remains a powerful influence over the British judiciary.¹⁵¹ Because of the European Convention on Human Rights' treaty status, the European Court of Human Rights is the only court that can directly force the executive to change its laws,¹⁵² which makes it more powerful than the British judiciary.¹⁵³ Even though British citizens may now bring human rights claims before British courts, British citizens still bring cases to the European Court of Human Rights every year. In fact, in 2011 alone, the European Court of Human Rights considered 1553 applications that had been lodged against the United Kingdom.¹⁵⁴

The European Court of Human Rights also directly influences the British judiciary. Per Human Rights Act Section 2, British courts are now required to "take account" of relevant European Convention on Human Rights jurisprudence, which includes decisions of the European Court of Human Rights and the European Commission and Committee of Ministers.¹⁵⁵ However, it is unclear what "taking account" of European Court of Human Rights jurisprudence means. The British judges also appear to disagree with each other (and sometimes with themselves) about what Section 2 requires. Some judges believe that "domestic courts and tribunals should, in the absence of special circumstances, follow the clear and constant

149. See Liberty & JUSTICE, *Liberty and JUSTICE submission to the United Nations Human Rights Committee: Response to the United Kingdom's Sixth Periodic Report Under the International Covenant on Civil and Political Rights*, U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, (Oct. 2007), http://www2.ohchr.org/english/bodies/hrc/docs/ngos/liberty_justice_UK93.pdf.

150. See generally Prevention of Terrorism Act, 2005, c. 2 (Eng.).

151. Alyssa King, *A Supreme Court, Supreme Parliament, and Transnational National Rights*, 35 YALE J. INT'L L. 245, 246 (2010).

152. The executive has said that it will follow European Court of Human Rights rulings. JOINT COMM. ON HUM. RTS., SIXTEENTH REPORT, *supra* note 77, at 46, 49.

153. *Id.*

154. The Eur. Ct. H.R., *In Facts and Figures 2011*, ECHR.COE.INT, 10 (Jan. 2012), http://www.echr.coe.int/NR/rdonlyres/C99DDB86-EB23-4E12-BCDA-D19B63A935AD/0/FAITS_CHIFFRES_EN_JAN2012_VERSION_WEB.pdf. Of these applications, only thirty cases against the UK were declared viable for a judicial opinion and only eight were decided against the UK. *Id.*

155. If the court fails to do so, it is arguably in violation, as a "public authority," of Section 6 of the Human Rights Act.

jurisprudence of that court.”¹⁵⁶ On the other end of the spectrum, some judges appear to almost completely disregard relevant European Court of Human Rights cases and even fail to mention these cases in their opinions.¹⁵⁷ Still other judges engage in strategic behavior with regard to European Court of Human Rights case law: they take note of it and follow it only when it agrees with the outcome they prefer.¹⁵⁸

Overall, the British judges overwhelmingly follow European Court of Human Rights cases.¹⁵⁹ Some judges’ strict adherence to European Court of Human Rights jurisprudence, despite their requirement to only “take into account” these cases, may be the result of the judges’ fear that the European Court of Human Rights will overturn any British court decision contrary to its own case law.¹⁶⁰ At least one Supreme Court justice, Lord Slynn, has specifically indicated that this concern motivates his adherence to European Court of Human Rights case law.¹⁶¹ Therefore, due to the European Court of Human Rights’ influence, the judiciary will probably be less willing to compromise with the other branches if the judiciary’s decision is supported by the European Court of Human Rights.

Despite its limited powers under the British constitution, by using the United Kingdom’s treaty obligations under the European Convention on Human Rights, the British judiciary can force the other branches to defer to its decisions that implicate human rights. However, European Court of Human Rights cases can hinder the British judiciary as well. The British judiciary may go beyond European Court of Human Rights cases and rule a statute incompatible even if it does not believe that the European Court of

156. *Huang v. Sec’y of State for the Home Dep’t*, [2007] UKHL 11, [18], [2007] 2 A.C. 167 (H.L.) (appeal taken from Eng.). *See also* *R v. Sec’y of State for the Home Dep’t*, [2002] UKHL 46, [18], [2003] A.C. 837 (H.L.) (Lord Bingham of Cornhill) (appeal taken from Eng.).

157. *See* *Attorney General’s Reference* (No. 2 of 2001), [2003] UKHL 68, [118-119], [2004] 2 A.C. 72 (H.L.) (Lord Hobhouse of Woodborough) (appeal taken from Eng.).

158. *See* S. K. Martens, *Incorporating the European Convention: The Role of the Judiciary*, EUR. HUM. RTS. L. REV. 5, 13 (1998). For example, in *Alconbury*, Lord Hoffman stated that he would not have followed the European Court of Human Rights cases if they had not agreed with his decision of how the case should be resolved. *R (Alconbury Developments Ltd.) v. Sec’y of State for the Env’t, Transp., and the Regions*, [2001] UKHL 23, [74]-[76] (Lord Hoffman) (Eng.). In other cases, British judges have explicitly departed from European Court of Human Rights cases because they did not agree with its holdings. *Ghaidan*, [2002] ECWA (Civ) 1533, [24] (Buxton L.J.) (Eng.).

159. Elizabeth Wicks, *Taking Account of Strasbourg? The British Judiciary’s Approach To Interpreting Convention Rights*, 11 EUR. PUB. L. 405, 410 (2005).

160. *Id.* at 412; *R (Anderson)*, [2002] UKHL 46. However, the European Court of Human Rights does give some deference to national governments under its doctrine of the “margin of appreciation.” The “margin of appreciation” is the deference the European Court of Human Rights gives a nation to determine how to comply with the European Court of Human Rights. *Hatton v. United Kingdom*, 34 Eur. Ct. H.R. 565, [129] (2002). Accordingly, if the issue is new or there is not much case law, there is a chance that the European Court of Human Rights will defer to the British judiciary or executive on the issue.

161. *R (Alconbury)*, [2001] UKHL 23, [31] (Lord Slynn).

Human Rights will agree.¹⁶² However, the judiciary is less likely to do so because it knows that the executive can ignore its declaration if the European Court of Human Rights does not agree.

Because the British executive is required to follow the European Court of Human Rights,¹⁶³ the executive has a greater incentive to make sure that its laws conform to the European Court of Human Rights' preferences, and it can do so at the expense of the British judiciary's preferences. For example, if a statute is close enough to the European Court of Human Rights' preference, the executive can safely ignore the British judiciary's Declaration of Incompatibility because if the plaintiff brings his or her case to the European Court of Human Rights, the statute will be upheld. On the other hand, if the European Court of Human Rights agrees with the British judiciary, it is likely that the executive will pass new or remedial legislation.

The European Court of Human Rights therefore represents a transaction cost, which will make it less likely that the executive or legislature will attempt to overrule a judicial decision with European Court of Human Rights backing. Both the judiciary and executive must consider the European Court of Human Rights' preferences when strategizing with each other. European Court of Human Rights cases that favor the British judiciary will make it harder for the executive to override the British judiciary and, thus, less likely that the executive will attempt to do so.

d. Deference to Parliament

Despite the British judiciary's new powers, deference is still an issue. Even when judges have reinterpreted a statute, they have done so with language that is highly deferential to Parliament's intent.¹⁶⁴ The Joint Committee on Human Rights has also criticized the courts for overly restricting the Human Rights Act's application and thereby failing to ensure that Convention rights are as widely applicable in domestic law as the

162. There are a few cases where it has done so. See Brice Dickson, *Safe in Their Hands? Britain's Law Lords and Human Rights*, 26 *LEGAL STUD.* 329, 335 (2006).

163. McGoldrick, *supra* note 32, at 924; see JOINT COMM. ON HUM. RTS., SIXTEENTH REPORT, *supra* note 77.

164. Int'l Transp. Roth GmbH, [2002] EWCA (Civ) 158, [184], [2003] Q.B. 728 (Parker L.J.) (Eng.) ("[I]n my judgment it would involve rewriting the scheme to an unacceptable extent, given the high degree of 'deference' which ought to be accorded to Parliament."); *Thoburn v. Sunderland City Council*, [2002] EWHC (Admin) 195, [2003] Q.B. 151, [187] (Laws L.J.) (Eng.) ("[T]he courts (in interpreting statutes and, now, applying the Human Rights Act 1998) will pay more or less deference to the legislature, or other public decision-maker, according to the subject in hand."); *R v. A*, [2001] UKHL 25, [2002] A.C. 45 (Lord Slynn of Hadley) (appeal taken from Eng.) ("[I]t is appropriate in some circumstances for the judiciary to defer, on democratic grounds, to the considered opinion of the elected body as to where the balance is to be struck between the rights of the individual and the needs of society."). See also Kavanagh, *The Role of Parliamentary Intention in Adjudication Under the Human Rights Act 1998*, *supra* note 97, at 193.

European Convention on Human Rights requires.¹⁶⁵ As recently as 2006, the European Court of Human Rights has found European Convention on Human Rights violations where the Supreme Court justices believed there were none.¹⁶⁶

The judiciary's continuing deference to Parliament cuts to the heart of the primary purpose of the Human Rights Act, as well as the judiciary's ability to effectively strategize against the other branches. The judiciary's reluctance to use its new powers under the Human Rights Act may cause the other branches of government to disregard the judiciary's preferences when drafting policies that may have human rights implications. Without the threat of judicial interference, either through interpretation or Declarations of Incompatibility, a real fear exists that the legislature and executive will not adequately ensure the protection of human rights when other pressing needs appear to outweigh such concerns.¹⁶⁷

However, there is evidence that the judiciary has begun to lessen its deference and adopt a more activist role with regards to human rights law. For example, courts have articulated that it is up to the courts to determine whether a claimant's Human Rights Act rights have been infringed upon, as well as whether the executive's act was proportionate.¹⁶⁸ A recent House of Lords case, *Re P*, [2008] UKHL 38, has also shown that the Law Lords will not defer to the executive even if the European Court of Human Rights would.

With or without deference to Parliament, the judiciary clearly engages in strategizing with the other government branches. The Human Rights Act has created a middle ground, giving the British judiciary increased powers of interpretation and the power to issue Declarations of Incompatibility, but still prohibiting it from striking primary legislation. Using these powers, the courts must still anticipate the preferences of Parliament, the executive, and the European Court of Human Rights. In turn, the executive and legislature

165. JOINT COMMITTEE ON HUMAN RIGHTS, *THE MEANING OF PUBLIC AUTHORITY UNDER THE HUMAN RIGHTS ACT*, SEVENTH REPORT, 2003-4, H.L. 39, H.C. 382, ¶ 41. (U.K.). Deference has caused judges to refuse to substantially reinterpret statutes and to side with the executive or Parliament on many controversial issues. Jeffrey Jowell, *Judicial Deference: Servility, Civility or Institutional Capacity?* PUB. L. 592, 599 (2003); IAN LEIGH, *Concluding Remarks* in JUDICIAL REASONING UNDER THE UK HUMAN RIGHTS ACT 432 (Helen Fenwick et al. eds. 2007). But see Huang, [2007] UKHL 11, [16] (Lord Bingham) (Supreme Court justifying its deference to the executive).

166. *Wainwright v. United Kingdom*, 44 Eur. Ct. H.R. 40 (2007); *Wainwright v. Home Office*, [2003] UKHL 53, [2004] 2 A.C. 406 (H.L.) (appeal taken from Eng.); JOINT COMM. ON HUM. RTS., SIXTEENTH REPORT, *supra* note 77, at [41]-[42]. See also Dickson, *supra* note 162, at 340 n.77.

167. Edwards, *supra* note 146, at 868 (quoting Iacobucci J. in *Vriend v. Alberta*, [1998] 1 S.C.R. 495, [139] (Can.)). Justice Iacobucci's statement was later quoted by Lord Justice Laws in *Int'l Transp. Roth GmbH*, [2002] EWCA (Civ) 158, [72], [2003] Q.B. 728 (appeal taken from Eng.).

168. *Belfast City Council*, [2007] UKHL 19 [31], [37] (Baroness Hale of Richmond), [88] (Lord Neuberger of Abbotsbury).

now have to anticipate the judiciary's reaction to legislation that impacts human rights, particularly if the judiciary has the backing of the European Court of Human Rights. When Parliament, the executive, and the legislature work together, it results in the creation or alteration of laws, similar to what is seen in the United States.

II. CHARTS

The effects of the different government structures and styles can be seen more easily through the use of charts. Theorists commonly use charts and models to explain and predict government behavior. In this article, charts will be used to show that the British government branches' policy goals and the utility of altering legislation to implement those goals may dictate those branches' behavior. As the charts below show, a branch's utility will change in response to the other branches' preferences and strategies.

The following charts carry several assumptions. First, because the executive branch still (for the most part) dominates Parliament through party control, the legislature and executive's interests are assumed to be the same. Limiting the charts to two dimensions also makes them easier to work with. Second, the judiciary and legislature/executive are presumed to be in conflict. More specifically, the judiciary is the first player in these charts and wants the law to change in line with its policy preferences. The legislature/executive wants the law to remain the same. Moreover, the judiciary is aware that the legislature/executive may override¹⁶⁹ any decision that strays too far from the legislature/executive's preferences.

Finally, the judiciary is also aware of the Human Rights Act's unpopularity with the public, who consider it a "villains' charter" that helps the undeserving.¹⁷⁰ Similarly, British citizens are suspicious of the judiciary having too much power because they see the judiciary as elitist and undemocratic compared to Parliament.¹⁷¹ For that reason, when British judges use the Human Rights Act, they open themselves and the Human Rights Act up to further criticism. Potential criticism is particularly problematic for the Human Rights Act because it is a controversial statute and, although it has constitutional implications, it can be repealed by a majority vote in Parliament, the same as any other statute.¹⁷²

169. A legislative override has been defined as Congress consciously overruling, modifying the result, or modifying the consequences of a judicial decision through subsequent legislation. Eskridge, *supra* note 102, at 332 n.1.

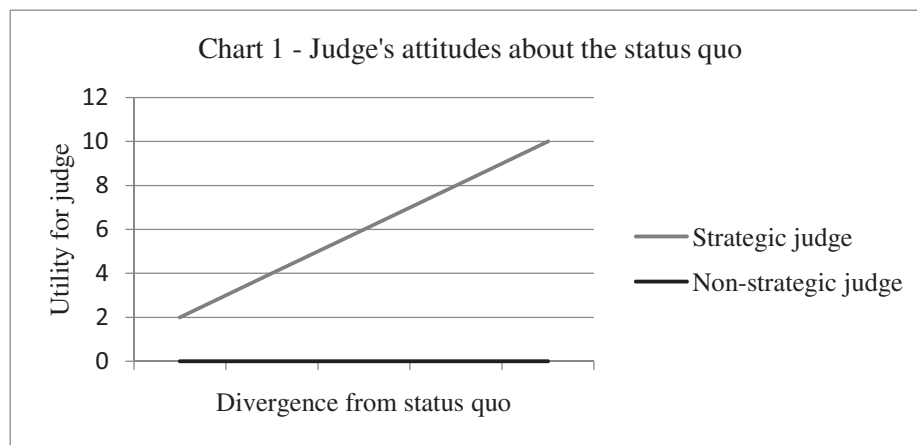
170. Sweeny, *supra* note 35, at 80.

171. *Id.* at 77-78.

172. *Id.* at 40.

A. Chart 1—Judge's Attitudes

In the first scenario, the hypothetical judge is unhappy with the status quo of a law. The more she can change the law, the happier she is. This chart shows both a strategic judge in an unconstrained environment (the judge has no fear of legislative reactions) and a non-strategic judge who does not try to advance her policy goals when making judicial decisions. As shown by the chart, the strategic judge gains more utility the more her decision changes the existing law. The non-strategic judge, in contrast, derives no utility from changing the existing law.



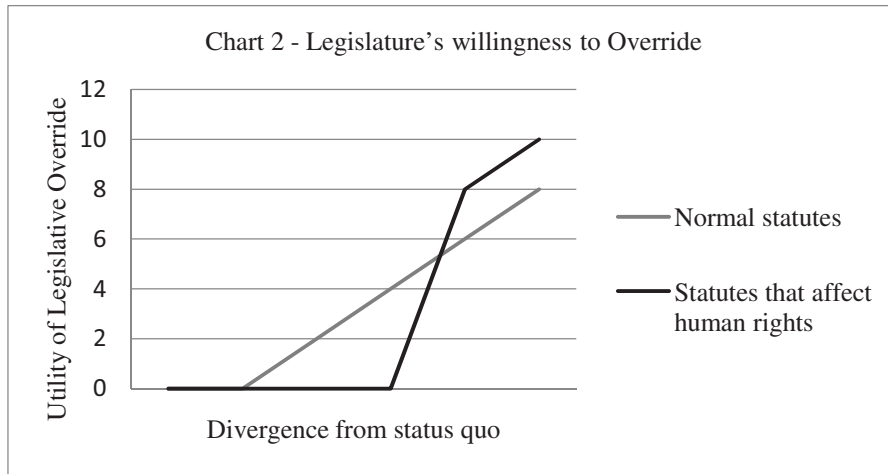
B. Chart 2—Adding the Legislature/Executive's Preferences

Chart 2 shows the British legislature/executive's desire to override the judge's decision. For both "normal" statutes and statutes that affect human rights, the legislature/executive's utility in overriding a judicial decision will vary depending on the override's transaction costs. In other words, the judge's decision has to be far enough away from the status quo for the legislature to bother with expending the time and effort necessary to draft new legislation and send it to Parliament for a vote.¹⁷³ This chart also shows that the legislature/executive will let the judiciary make larger changes to existing human rights legislation. However, these branches will also have a stronger reaction if the judiciary goes too far.

This variance in the legislature/executive's reactions is the result of the impact of the European Court of Human Rights and the HRA itself. Because the European Court of Human Rights can strike legislation that violates the ECHR, the legislature/executive have increased transaction costs when they attempt to override judicial decisions in that area, particularly if the judiciary defers to prior European Court of Human Rights decisions (which

173. Rogers, *supra* note 1, at 88.

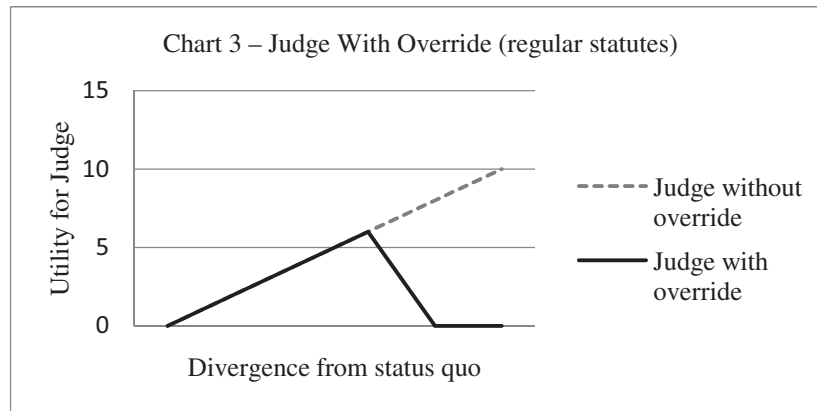
it often does). Specifically, the legislature/executive risks a case being brought to the European Court of Human Rights, having to defend itself before the European Court of Human Rights, and risking the embarrassment of the European Court of Human Rights, ruling the new statute incompatible with the ECHR. On the other hand, the Human Rights Act is controversial, so the legislature/executive are likely to have a stronger reaction to the judiciary pushing human rights laws too far.



C. Chart 3—Judiciary's Awareness of Potential Override

Chart 3 shows the judiciary's calculation of how far it is willing to deviate from the status quo knowing that, at a certain point,¹⁷⁴ the legislature will override its decision. This chart is limited to the judiciary's calculations for statutes without human rights implications. The calculations of the British judiciary will be similar to those of the American judiciary, but the British judiciary must also anticipate the reality that the executive, due to its party control over Parliament, will find re-legislating much easier than Congress would. The British judiciary therefore has much more reason to be conservative in its interpretations, especially considering the British judiciary's historical deference and role perceptions. This model shows that, because of its fear of an override, the judiciary will not differ too far from the existing legislation, because if that decision is overridden, the judiciary will achieve less or even zero utility overall.

174. It is possible to create equilibria for a situation of complete legislative domination where the legislature would override any judicial decision with which it does not agree. *Id.* at 92. This chart assumes, however, that, due to transaction costs, there is always a point where the legislature/executive will not bother to override a judicial decision. *Id.*

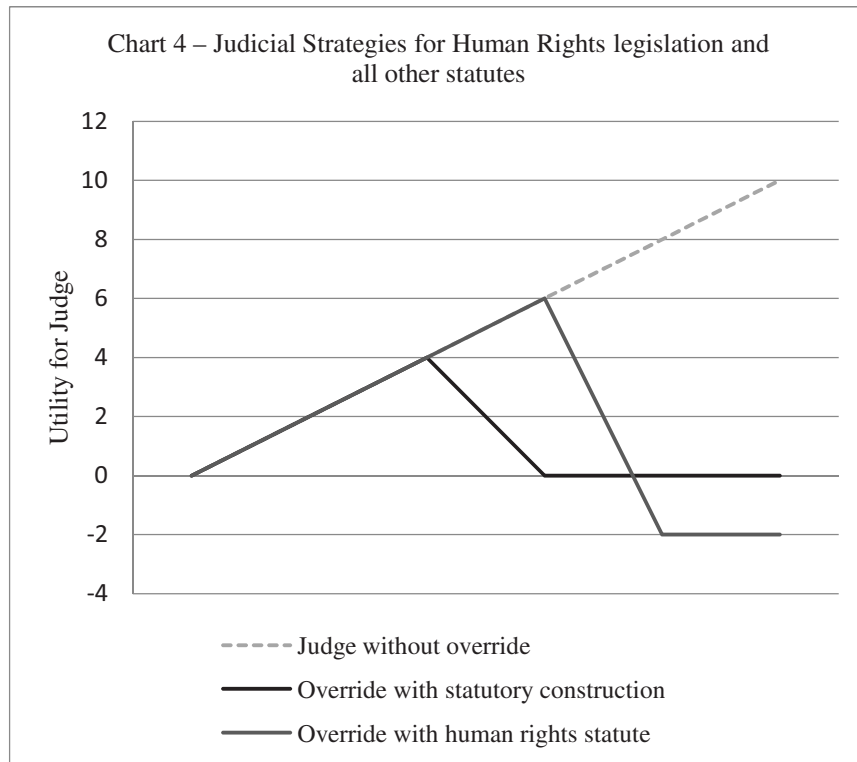


D. Chart 4—Judiciary's Strategies

Chart 4 compares judicial strategies for typical statutory construction with strategies for statutes that affect human rights. As seen in Chart 2, legislative utilities will differ depending on the type of legislation the judiciary is considering. If the ECHR is implicated, the British judiciary has more power to interfere with legislation, and the legislature/executive will be less likely to re-legislate and risk the displeasure of the European Court of Human Rights. Knowing that they have the support of the European Court of Human Rights, judges are willing to deviate further from the status quo for legislation that impacts human rights.

However, due to the legislature/executive's predicted negative reaction to expanding the Human Rights Act's influence too far, the judiciary may encounter negative utility if its human rights decision is overridden. As noted above, the Human Rights Act is controversial and vulnerable, so a false step will mean higher consequences for the judge and the Human Rights Act itself. Indeed, by pushing its own policy preferences too far, the British judiciary risks the executive/legislature using the Human Rights Act's lack of constitutional status to repeal the Human Rights Act.¹⁷⁵

175. Indeed, the Conservative Party is still calling for its repeal. Brendan Carlin, *Tory Donors Tell Cameron to Create True Blue Cabinet*, *DAILY MAIL*, July 29, 2012.



Taken together, these charts show that the British government branches interact strategically—much like the American government branches—but with some differences. Unlike in the United States, the subject matter of a law can drastically change the relative powers and strategies of the British government branches. When reviewing legislation that impacts human rights, British judges, despite their inability to strike statutes and cultural deference to Parliament, can still push their policy preferences. Judging by some Ministerial statements, it seems clear that legislative and executive branches are very aware of the power of the judiciary with regards to human rights, which indicates that human rights issues do alter their behavior without the judiciary actually having to intervene.¹⁷⁶

Further, due to the inherent interconnectedness between the British government branches, they are likely to have better information exchanges, which will lead to better predictions regarding how a branch will react to a new law. Indeed, there is much evidence that the British government branches do informally communicate, particularly where legislation raises

176. For example, Tessa Jowell, in response to questioning about the failure to make a statement of compatibility for the Communications Bill 2002, acknowledged that if the Bill were found to be incompatible in domestic courts, “we would need to reconsider our position.” 395 PARL. DEB., H.C. (6th ser.) (2002) 789 (U.K.).

human rights concerns.¹⁷⁷ Accordingly, these charts, although simplified, shed light on how the British government branches strategize with each other when creating law.

CONCLUSION

As a consequence of recent constitutional reform legislation, particularly the Human Rights Act, the British government's structure has shifted repeatedly over the past few years. More specifically, the Human Rights Act has created a more independent judiciary with new powers to interpret and even strike legislation that more closely resemble the powers of the American judiciary.

The Human Rights Act has also changed how the judiciary sees its role in the government. Judges are no longer limiting themselves to reading the statutory text and "announcing" what Parliament intended. They are now actively interpreting statutes and coming to conclusions that are sometimes unexpected and undesired by Parliament and the executive. These changes, if not bringing the British government closer to the American government culture, make the British government more transparent and, therefore, easier to study. Moreover, at least in the area of human rights law, it is now possible to see the judiciary strategize with the other branches.

The Human Rights Act has also shifted some power away from the executive to the legislature through the JCHR, which has created greater transparency and a structure that is closer to the American system of checks and balances. For example, because the Human Rights Act requires that the government branches communicate and interact in a structured and official framework, scholars can use the data created by this framework to formulate testable hypotheses about how the three branches (now more separate and independent) work together (or not) to create laws. Accordingly, through these recent constitutional changes, the differences between the two countries' governments have been reduced to the point where scholars in both countries can now discover the strategies the British government branches use when creating law.

The brief analysis above shows that the three branches of government in the United States and the United Kingdom influence the way in which the other branches act. However, future research is still necessary to show whether political strategizing can fully account for the creation of law in the United Kingdom. Although political strategizing does provide some explanation for the interactions among the government branches (and the

177. Oliver, *Constitutional Scrutiny of Executive Bills*, *supra* note 80, at 43; Feldman, *Injecting Law into Politics and Politics into Law*, *supra* note 88, at 117; Feldman, *Impact of Human Rights*, *supra* note 88, at 91; Hiebert, *Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?*, *supra* note 74, at 24. There is evidence that there is also some informal communication between Congress and the judiciary. Milligan, *Congressional End-Run: The Ignored Constraint on Judicial Review*, *supra* note 6, at 247.

European Court of Human Rights), the United Kingdom's history has created a different political culture that must still be considered. Remaining issues of judicial deference and executive dominance over Parliament should be added to any future analysis of the United Kingdom in order to capture a full explanation of how law is created there.

